Cassels

A Complete Code: Was Canada's Defence in Raincoast Conservation Foundation v. Canada (Attorney General) Consistent with the Purpose of the NEB Act?

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On September 4, 2019, in *Raincoast Conservation Foundation v. Canada (Attorney General)*[1], Justice Stratas of the Federal Court of Appeal allowed six applications by First Nations for judicial review of the Trans Mountain Pipeline Expansion Project (TMEP) to proceed and dismissed six other applications, including by environmental agencies, the City of Vancouver, and two First Nations.

The decision focused on section 55(2) of the *National Energy Board Act* (the Act) which requires that a judge decide, on a summary basis (based on written arguments) and without delay, whether an appeal of a decision of the Governor in Council should proceed.

The Act provides a complete code over project approvals.[2] "It provides for the National Energy Board studying and assessing the project, the Board providing a report to the Governor in Council, and the Governor in Council considering the report and deciding one way or the other."[3] [4]

As Justice Stratas noted, one of the key objectives of the Act is to "prevent delay to a project that may benefit the public considerably."[5] "Leave must be sought quickly so that projects approved by the Governor in Council will not be unnecessarily held up."[6] "Any recourse to the judicial system must be necessary and as short as possible."[7] "Thus, the leave requirement [of the Act] is not just a cursory checkpoint on the road to judicial review. It is more like a thorough customs inspection at the border."[8]

The Issues Raised

The Court summarized the issues on appeal into four categories:

1. Alleged conflict of interest and bias;

2. Environmental issues and substantive reasonableness;

3. Issues relating to the consultation with Indigenous peoples and First Nations; and

4. Miscellaneous issues.[9]

Examination of the Issues – Other than Consultation

Justice Stratas considered each of the issues raised in order to determine whether they were capable of satisfying the "fairly arguable" standard, which is the required standard for proceeding to a full judicial review. Only arguments which reach the "fairly arguable" standard will justify a prolonged review that will delay a project which has been approved by the Governor in Council. The "fairly arguable" standard applied by the Court is informed by the Act's role as a gatekeeper, the deference owed to the Governor in Council decision maker, and requires focusing on issues which strike at the root of the decision and which could potentially lead to a different result if the decision is returned to the decision maker.[10]

In assessing whether the issues raised met the "fairly arguable" standard, Justice Stratas had the benefit of the written record including the brief recitals in the Governor in Council's Order in Council[11] and written arguments from the applicants and from the Attorney General of Alberta, which was an intervenor.[12] [13] However, the Government of Canada "took no position for or against the leave motions," and as a consequence, "offered **no submissions or evidence to assist the Court** [*emphasis added*]."[14]

The Court determined that the alleged conflict of interest and bias, which was claimed to exist because Canada purchased the TMEP prior to the Order in Council decision, did not meet the "fairly arguable" standard, as there was not a "shed of evidence to support it."[15] The Court concluded that "[w]ithout evidence, suggestions of bias or conflict of interest are just idle speculations or bald allegations and cannot possibly satisfy the test of a 'fairly arguable case.'"[16]

The Court rejected arguments around environmental issues and substantive reasonableness, noting that the decision in *Tsleil-Waututh Nation* had already examined these issues and identified only the omission of project-related marine shipping as a deficiency. The Court noted that arguments that were, or could have been, made in *Tsleil-Waututh Nation* could not be relitigated.[17] The Court also noted that the National Energy Board had subsequently issued a 678 page report on project-related marine shipping[18] and that based on the scheme of the Act, it would be "impossible for the applicants to overcome the considerable deference the Court must afford to the Governor in Council as it considered the new report, in all its detail and technicality, and as it makes this sort of public interest decision."[19]

Regarding miscellaneous issues, the Court noted that "none of them met the 'fairly arguable' standard."[20]

In assessing all of these issues above, the Court was able to rely on the public record and existing law to conclude that an appeal should not proceed under the Act, having concluded that the arguments were not capable of reaching the "fairly arguable" standard. An appeal on these bases would, in effect, unnecessarily delay the development of the TMEP and therefore be contrary to the purposes of the Act.

Examination of the Issues - Consultation

In assessing the adequacy of consultation, the Court looked to existing jurisprudence to identify arguments that would not meet the “fairly arguable” standard. This included rejecting arguments that suggested Indigenous consent was required and arguments that were, or could have been, raised before the court in *Tsleil-Waututh Nation*.>

However, for substantive arguments pertaining to the consultation that occurred after the publication of *Tsleil-Waututh Nation*, the Court lacked the disclosure it needed from Canada to fully appreciate the consultation that had occurred. Justice Stratas noted, “at this time, however, the respondents have withheld their evidence and legal submissions on these points. So the analysis cannot progress any further.”[21] “Therefore, this court must conclude that the issues of adequacy of the further consultation arising from the circumstances described… above meets the ‘fairly arguable’ standard for leave [*emphasis added*].”[22]

The Implications of Canada’s Approach

In deciding to not take a position in this appeal, Canada permitted additional litigation following the lengthy review and approval process of the Governor in Council. While the purpose of the Act is to ensure that “any recourse to the judicial system must be as short as possible,” this purpose may be undermined without Canada providing submissions or evidence to assist the court.

Canada did not take a "position on eleven of the twelve leave motions because they considered the threshold for leave [being the satisfaction of the 'fairly arguable' standard] to be quite low."[23] In our view, had Canada fully participated, it is possible that the Court could have found that the “fairly arguable” standard in relation to the Crown’s duty to consult had not been met, thereby avoiding further litigation and uncertainty. Given that the “Governor in Council found that compelling public interest considerations clearly outweighed the adverse environmental effects,”[24] a delay of the TMEP, will by necessity, harm the public interest.

Canada’s approach also disadvantages the Indigenous appellants, who, assuming Canada has met its duty to consult in relation to the TMEP, could have avoided unnecessary legal costs associated with a full appeal.

Lessons for Governments

As the authors have stated elsewhere, true reconciliation requires that all parties act and speak truthfully. Canada’s unique and constitutionally enshrined protections for Indigenous rights has evolved through the active engagement of all parties, each working to advance an alternative vision for reconciliation. Any efforts to restrict government lawyers from fully and respectfully defending government action does not promote lasting and meaningful reconciliation.

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[1] *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224.

[2] *Ibid*, at para 10.

[3] *Ibid*.

[4] Following the decision of the Governor in Council for the TMEP, the Act was replaced by the *Canadian Energy Regulator Act*, which has a similar provision to that found in section 55(2) of the Act.

[5] *Ibid*.

[6] *Ibid* at para 11.

[7] *Ibid* at para 12.

[8] *Ibid* at para 13.

[9] *Ibid* at para 30.

[10] *Ibid* at para 16.

[11] *Ibid* at para 61.

[12] *Ibid* at para 59.

[13] The Court noted that the Alberta Attorney General was not a party to the consultation and could not make submissions on the consultation process.

[14] *Ibid* at para 59.

[15] *Ibid* at para 35.

[16] *Ibid*.

[17] *Ibid* at para 40.

[18] *Ibid* at para 42.

[19] *Ibid* at para 44.

[20] *Ibid* at para 69.

[21] *Ibid* at para 63.

[22] *Ibid* at para 64.

[23] *Ibid* at para 8.

[24] *Ibid* at para 45.
